

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter Of:	)	
	)	
Revision of Part 22 of the Commission's	)	CC Docket No. 92-115
Rules Governing the Public Mobile Services	)	
	)	
Amendment of Part 22 of the Commission's	)	CC Docket No. 94-46
to Delete Section 22.118 and Permit	)	RM 8367
the Concurrent Use of Transmitters in	)	
Common Carrier and Non-common Carrier	)	
Service	)	
	)	
Amendment of Part 22 of the Commission's	)	CC Docket No. 93-116
Rules Pertaining to Power Limits for Paging	)	
Stations Operating in the 931 MHz Band in	)	
the Public Land Mobile Service	)	

**PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION  
PETITION FOR PARTIAL STAY**

The Personal Communications Industry Association ("PCIA") herewith petitions the Commission for a partial stay of the effective date of rules adopted in the Commission's Report and Order in the above-captioned docket.<sup>1</sup> First, PCIA seeks a deferral of the effective date of the newly adopted 931 MHz paging application processing rules until after the Commission has had an opportunity to evaluate a consensus proposal for an alternative processing framework upon reconsideration. Second, PCIA seeks a deferral of the enforcement of a new policy, adopted without public notice or comment, that prohibits multiple licensing of transmitters.

<sup>1</sup> Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115 (Sept. 9, 1994) ["Part 22 Rewrite Order"].

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PCIA has concurrently filed a petition for reconsideration in this docket detailing its 931 MHz licensing proposal and requesting elimination of the new transmitter sharing policy.<sup>2</sup> PCIA does not anticipate the Commission will be able to act on reconsideration in this docket prior to the January 1, 1995, effective date of the new rules. Thus, PCIA is requesting deferral of the effect date of these two specific sets of rules and policies until after action on reconsideration. As discussed below, both of these requests meet the applicable criteria for evaluating stay motions set out in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) ("*Holiday Tours*"), and *Virginia Petroleum Jobbers v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) ("*Petroleum Jobbers*").

### ARGUMENT

PCIA is requesting a stay of the effective date of two aspects of the *Part 22 Rewrite Order* -- the 931 MHz application processing rules and the policy against multiple licensing of transmitters. To justify a stay of an administrative order, the *Holiday Tours* case requires consideration of the following four factors:

- (1) Has the petitioner made a strong showing that it is likely to prevail on the merits? . . .
- (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . .
- (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . .

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<sup>2</sup> Personal Communications Industry Association Petition for Reconsideration or Clarification, CC Docket No. 92-115 (filed Dec. 19, 1994) ["*PCIA Petition*"].

(4) Where lies the public interest?

559 F.2d at 842 (citing *Petroleum Jobbers*, 259 F.2d at 925).

The *Holiday Tours* court noted that the first factor is not to be applied as a "wooden . . . requirement."<sup>3</sup> In particular, the court stated:

The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, . . . may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

*Id.* at 843-44. The court further observed that "a court, when confronted with a case in which the other three factors strongly favor interim relief[,] may exercise its discretion to grant a stay if the movant has made a *substantial* case on the merits."<sup>4</sup>

Based upon the *Holiday Tours* criteria, a stay of the effective date of both the 931 MHz paging application processing rules and the new policy against multiple licensing of transmitters is warranted and legally mandated. In both cases, as discussed below, each of the four *Holiday Tours* criteria are satisfied. Accordingly, a partial stay of the effective date of the *Part 22 Rewrite Order* should be ordered.

**A. The Commission Should Stay the Effective Date of the 931 MHz Application Processing Rules**

The FCC adopted rules for existing 931 MHz paging applications that provide entirely new auction-based and frequency-specific procedures for 931 MHz paging applications. By

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<sup>3</sup> *Id.* at 844.

<sup>4</sup> *Id.* (emphasis added).

setting a delayed effective date of January 1, 1995, for the new processing regime, the FCC intended to eliminate virtually all of the pending backlog of applications before the new rules became effective. Unfortunately, processing of 931 MHz applications has come to a virtual standstill. It is PCIA's understanding that the staff currently is processing applications filed in April, 1994, and at best, the staff hopes to reach May- or June-filed applications by the end of the year. Thus, contrary to the staff's desire of being virtually caught up with pending application processing, a six to eight month backlog of 931 MHz applications will remain at the January 1st deadline. As discussed below, PCIA believes a stay of the effective date is warranted by the circumstances under the *Holiday Tours* criteria:

*First, it is likely that the new 931 MHz application processing rules will be altered upon reconsideration.* Based upon the substantial backlog of pending applications, alterations to the 931 MHz processing framework are virtually mandated. Even with the new frequency-specific procedures, attempting to identify groups of mutually-exclusive applications with a six-month backlog is a herculean task. In its petition for reconsideration, PCIA has instead proposed an industry-backed plan that would eliminate much of the backlog and split the remaining mutually-exclusive applications into two manageable subsets of applications.<sup>5</sup> The proposal, as drafted, represents a fair, consensus approach to transitioning to a frequency-specific auction framework that offers great administrative efficiencies. Under the circumstances, PCIA believes that alterations to the existing transition provisions are both warranted and necessary upon reconsideration.

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<sup>5</sup> *PCIA Petition* at 3-8.

*Second, without a stay of the effective date of the new 931 MHz application processing rules, the industry will be irreparably harmed.* If the Commission does not stay the effective date of the new processing rules, the backlog of applications that currently exists will result in an unmanageable morass of daisy-chained applications that could stall development of the 931 MHz paging band for years to come. As an initial matter, processing the backlogged applications as a single batch increases the complexity of the mutual exclusivity problem by an order of magnitude. Moreover, the longer it takes to process the backlogged applications, the longer it will take for applicants to determine what frequencies remain available in particular areas. Without this information, carriers will be unable to undertake expansion plans or apply for new areas to meet public demand. Indeed, the ability of licensees to meet customer needs by undertaking even minor system modifications may be delayed for six to twelve months or longer.

*Third, the issuance of a stay of the effective date of the new 931 MHz application processing rules will not harm any other parties to the proceeding.* While there are potentially those applicants that wish to file under the new rules, these parties cannot file frequency-specific applications without knowing what frequencies are available. By deferring the effective date of the rules and adopting PCIA's industry consensus plan for resolving the pending application problem, however, the FCC will be able to speed service to the public by existing applicants and also more quickly provide information on frequency availability. This will then result in all applications being processed more expeditiously and service initiation at an earlier date. Accordingly, no parties should be harmed by grant of a stay.

*Fourth, the public interest supports granting a stay of the effective date of the new 931 MHz application processing rules.* As PCIA has noted, there are tremendous public interest benefits to staying the effective date of the rules. Staying the effective date of the rules will avoid allowing the backlogged applications to slow development of the 931 MHz band. Under the circumstances, a stay is in the public interest and should be granted.

**B. The Commission Should Stay the Effective Date of the Policy Against Multiple Licensing of Transmitters**

In the *Part 22 Rewrite Order*, the Commission stated:

[W]e do not believe that it is in the public interest to allow two different licensees to share the same transmitter. We are concerned that the shared use of the same transmitter by two different licensees may raise questions regarding the control and responsibility for the transmitter. We are also concerned about the broader service disruptions that outages of shared transmitters would cause.<sup>6</sup>

Despite this statement of policy, no rule contains this specific ban. The policy represents a radical departure from current practice, was not a proposal in the original Part 22 Rewrite proceedings, and was not subject to public comment. Moreover, as PCIA has noted in its simultaneously-filed petition for reconsideration, the rationales expressed for the rule are unjustified and may have the effect of limiting the availability of service in rural areas.<sup>7</sup> As detailed below, evaluation of the *Holiday Tours* factors under these circumstances argues strongly in favor of a stay.

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<sup>6</sup> *Part 22 Rewrite Order* at ¶71.

<sup>7</sup> *PCIA Petition* at 8-10.

*First, because the new policy against multiple licensing of transmitters is contrary to the law, this policy is likely to be altered upon reconsideration.* As PCIA noted, the Commission did not provide sufficient notice that it was proposing to change its policies allowing the multiple licensing of transmitters either in the original *Part 22 Rewrite Notice* or in the *Part 22 Rewrite Supplemental Notice*.<sup>8</sup> Nor did any filers address the issue in their comments. Accordingly, as a policy adopted in violation of the Administrative Procedures Act, it should lawfully be eliminated upon reconsideration. In any event, the *Part 22 Rewrite Order* is also defective because it provides an insufficient explanation for the reversal in policy, and "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."<sup>9</sup> Under the circumstances, it is highly likely that PCIA's petition for reconsideration on this issue will succeed on the merits.

*Second, without a stay of the effective date of the new policy against multiple licensing of transmitters, the industry and the public will be irreparably harmed.* The policy regarding the multiple licensing of transmitters is a reversal of the Commission's prior policy and, accordingly, will affect the existing operations of a broad number of licensees. To avoid placing themselves in violation of the Commission's new policy, it is arguable that at least one operator of every multiple-licensed station will be required to return its authorization to the Commission for cancellation and to cease operations. Since the multiple-

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<sup>8</sup> Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, 7 FCC Rcd 3658 (1992) [*Part 22 Rewrite Notice*]; 9 FCC Rcd 2596 (1994) [*Part 22 Rewrite Supplemental Notice*].

<sup>9</sup> *Motor Vehicles Mfrs. Ass'n. v. State Farm Mut.*, 463 U.S. 29, 42 (1983).

licensing arrangement is largely used in rural areas where economic conditions do not justify separate facilities, neither licensee may have sufficient traffic to warrant separate facilities and both licensees may be required to eliminate coverage in the area. Because the public has come to depend upon the coverage allowed by multiple licensing arrangements, reversing the policies allowing multiple licensed facilities will have a severe impact on the public as well as on the carriers using such arrangements.

*Third, the issuance of a stay of the effective date of the new policy against multiple licensing of transmitters will not harm any other parties to the proceeding.* In this case, because a stay of the new policy would only preserve the *status quo*, no harm to any party will occur if a stay is granted. Preservation of the *status quo* will allow the Commission to proceed with an inquiry, based upon public comment, into the relative benefits and costs of reversing its multiple licensing policies.

*Fourth, the public interest supports granting a stay of the effective date of the new policy against multiple licensing of transmitters.* As noted in PCIA's petition for reconsideration on this issue, the reversal of the multiple licensing policy is not in the public interest.<sup>10</sup> The dual licensing of transmitters is a practice used in some rural areas to extend service coverage where it is not economically justifiable to maintain two separate sets of facilities. Multiple licensed transmitters are generally monitored and maintained by both of the carriers involved and, thus, contrary to the rationale expressed in the order, outages are twice as likely to be rapidly detected and corrected. Furthermore, the sharing of transmitters by private licensees is quite common, and does not appear to raise questions of

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<sup>10</sup> *PCIA Petition* at 10.



control. Thus, neither of the Commission's stated rationales actually support eliminating the existing policy, much less support requiring the elimination of service during the pendency of a proceeding legally conducted under Administrative Procedure Act requirements.

### CONCLUSION

As PCIA has shown, application of the four *Holiday Tours* criteria to the instant partial stay requests favors granting the requested relief. In the case of the 931 MHz paging application processing rules, grant of a stay will ultimately provide great public benefits by allowing consideration of a plan to reduce the backlog and more rapidly begin processing new applications. In the case of the new policy regarding multiple licensed transmitters, a stay would avoid cutting off existing service to the public in rural areas as the result of the application of a policy reversal that was not properly adopted under Administrative Procedure Act requirements. Accordingly, PCIA respectfully requests the Commission to stay the effective date of the 931 MHz application processing rules and the policy prohibiting multiple licensing of transmitters until after the Commission has reviewed these issues upon reconsideration.

Respectfully submitted,

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Dated: December 19, 1994

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of December, 1994, I caused copies of the foregoing "Petition for Partial Stay" to be hand delivered to the following:

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